No. 11454

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. P. BONHAM, District Director, Immigration and Naturalization Service,

Appellant,

vs.

HELENE EMILIE BOUISS,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE PAUL J. McCORMICK, *Judge*

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal from an order granting a Writ of Habeas Corpus. The appellee, HELENE EMILIE BOUISS, now forty years of age, was born in Kobe, Japan, on March 11, 1906, and is one-half blood of the Japanese race and one-half blood of the white race; her mother having been of the Japanese race and her father of the German race. Appellee has resided in Japan her entire life, and is presently a citizen of Sweden, having acquired Swedish nationality through

marriage to a Swedish subject, John Walgren Wilson, on May 9, 1925. This marriage was terminated by divorce September 14, 1937. On May 9, 1946, en route from Japan to the United States, appellee was married on the high seas to John Anthony Bouiss, a citizen of the United States, then serving in the Armed Forces of the United States. Upon arrival at the port of Seattle, Washington on May 12, 1946, appellee was removed to the Immigration Station where she was accorded a hearing before a legally constituted Board of Special Inquiry. Based upon the evidence adduced at said hearing, the appellee's application for admission to the United States was denied by said Board of Special Inquiry for the reason that she was found to be an immigrant alien not in possession of a valid immigration visa, and an alien ineligible to citizenship, and not entitled to enter the United States under any exception of paragraph (c), Section 13 of the Immigration Act of 1924. The appellee appealed from this decision of the Board of Special Inquiry to the Attorney General of the United States, and on June 10, 1946, the Commissioner of Immigration and Naturalization at Philadelphia, Pennsylvania, acting for and on behalf of the Attorney General, entered a Memorandum Decision ordering that the said excluding decision of the Board of Special Inquiry be affirmed, solely on the ground that under Section 13(c)

of the Act of May 26, 1924, as amended, the appellee is inadmissible to the United States, in that she is an alien ineligible to citizenship, and not entitled to enter the United States under any exception of said subsection. Thereafter, the record was forwarded to the Board of Immigration Appeals, and the order of the Commissioner of Immigration and Naturalization of June 10, 1946, was entered and approved by the Board of Immigration Appeals.

The appellee, through her husband John Anthony Bouiss, thereafter applied to the District Court of the United States for the Western District of Washington, Northern Division, for a Writ of Habeas Corpus, alleging in general terms that the exclusion order, and her detention by the Immigration authorities, was unlawful, null and void, in that as the lawful wife of a citizen of the United States, serving in the Armed Forces of the United States she is lawfully admissible to the United States as a non-quota immigrant under Section 4(a) of the Immigration Act of 1924, and by virtue of Public Law 271, 79th Congress, Chapter 591, First Session, approved December 28, 1945, 8 U. S. C. A., Section 232.

On July 29, 1946, the said District Court for the Western District of Washington, Northern Division, granted the Writ and ordered that the appellee be dis-

charged and released from any custody control, or detention of the Immigration authorities of the United States.

ERRORS ASSIGNED

The court erred:

1. In holding and deciding that a writ of Habeas Corpus be awarded to the appellee, Helene Emilie Bouiss.

2. In holding, deciding and adjudging that the appellee, Helene Emilie Bouiss, be discharged from the custody of appellant.

3. In deciding, holding and adjudging that the appellee, Helene Emilie Bouiss, even though ineligible to naturalization, was admissible to the United States as a non-quota immigrant under Section 4(a) of the Immigration Act of 1924.

4. In deciding, holding and adjudging that the appellee, Helene Emilie Bouiss, was admissible to the United States under Public Law 271, 79th Congress, Chapter 591, First Session, approved December 28, 1945, 8 U.S.C. Sec. 232.

LAW AND AUTHORITIES

Public Law 271, 79th Congress, Chapter 591, First Session, approved December 28, 1945, 8, U.S.C.

Section 232, provides for the admission to the United States of alien spouses and alien children of United States citizens serving in, or having an honorable discharge certificate from the Armed Forces of the United States during the second World War under certain conditions, if otherwise admissible under the Immigration laws, and reads as follows:

> "Notwithstanding any of the several clauses of section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, *if otherwise admissible under the Immigration laws* and if application for admission is made within three years of December 28, 1945, be admitted to the United States: Provided, That every alien of the foregoing description shall be medically examined at the time of arrival in accordance with the provisions of section 152 of this title, and if found suffering from any disability which would be the basis for a ground of exclusion except for the provision of sections 232-236 of this title, the Immigration and Naturalization Service shall forthwith notify the appropriate public medical officer of the local community to which the alien is destined: Provided, further, That the provisions of sections 232-236 of this title shall not affect the duties of the United States Public Health Service so far as they relate to quarantinable diseases." (Italics supplied)

Section 4(a) of the Immigration Act of 1924, 8 U.S.C. 204, provides for the non-quota status of the unmarried children, the wife, or the husband of a citizen of the United States, and reads as follows:

> "When used in this Act the term 'non-quota immigrant' means—
>
> (a) An immigrant who is the unmarried child under twenty-one years of age, or the wife, or the husband, of a citizen of the United States: Provided, That the marriage shall have occurred prior to issuance of visa and, in the case of husbands of citizens, prior to July 1, 1932."

Section 13(c) of the Immigration Act of 1924, 8 U.S.C. 213, provides that no alien ineligible to citizenship shall be admitted to the United States with certain exceptions, and reads as follows:

> "No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivisions (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

Section 28(c) of the Immigration Act of 1924, as amended, 8 U.S.C. 224, is descriptive of the term "ineligible to citizenship", and reads as follows:

> "The term 'ineligible to citizenship', when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under section 303 or 306

of the Nationality Act of 1940, as amended (54 Stat. 1140, 1141; U.S.C., Title 8, Secs. 703, 706), or section 3(a) of the Selective Training and Service Act of 1940, as amended (55 Stat. 845; U.S.C., Title 50, App. Supp. III), section 303 (a), or under any law amendatory of, supplementary to, or in substitution for, any such sections."

Section 303 of the Nationality Act of 1940, 8 U.S.C. 703, defines those racially eligible to become naturalized, and provides in part as follows:

"The right to become a naturalized citizen under the provisions of this Act shall extend only to white persons, persons of African nativity or descent, descendants of races indigenous to the the Western Hemisphere, and Chinese persons or persons of Chinese descent . . .".

Part 350, Title 8, Code of Federal Regulations, promulgated by the Commissioner of Immigration and Naturalization with the approval of the Attorney General, under the authority contained in Section 327, 54 Stat. 1150 (8 U.S.C. 727) reads in part as follows:

" . . . *Persons of mixed racial bloods.*
A person of mixed racial bloods, *to be eligible to naturalization within the limitations of § 350.1* [1] *of this part, must be* — (a) a person who is of as much as one-half blood of the white race,

[1] 350.1 "Racial eligibility; general classes. Except as otherwise provided in this Part, naturalization under the provisions of the Nationality Act of 1940 is limited to white persons, persons of African nativity or descent, descendants of races indigenous to the Western Hemisphere, and Chinese persons or persons of Chinese descent . . ."

African nativity or descent, a race indigenous to the Western Hemisphere, or a combination of any such races, and is *not of as much as one-half blood of any other race or combination of races.*" (Italics supplied)

Section 17 of the Immigration Act of February 5, 1917 (8 U.S.C. 153), provides that Boards of Special Inquiry shall have authority to determine whether applicants shall be allowed to land or shall be deported, and that " . . . In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereinafter made, the decision of the Board of Special Inquiry adverse to the admission of such alien shall be final unless reversed on appeal to the Attorney General . . ."

ADMINISTRATIVE FINDINGS AND CONCLUSIONS

The findings, conclusions and exclusion order of the local Board of Special Inquiry are shown on pages 30-31, and 34 of the certified record of the Immigration and Naturalization Service, Exhibit Number 56171/680. The findings, conclusions and order of the Commissioner of Immigration and Naturalization entered and approved by the Board of Immigration Appeals, Washington, D. C., affirming the excluding decision of the Board of Special Inquiry on the ground

that the alien is ineligible to citizenship, are contained in the same Exhibit, and are quoted below:

"File: 56171/680 — Seattle (1200-15858)

In re: HELENE EMILIE BOUISS alias AIDO AJUMA nee WAGENKNECHT formerly WILSON

IN EXCLUSION PROCEEDINGS

IN BEHALF OF APPELLANT: No one

EXCLUDED: Act of 1924 — No immigration visa
— Ineligible to citizenship

APPLICATION: Admission for permanent residence

DISCUSSION: The appellant is a 40-year-old married female, who was excluded by a Board of Special Inquiry at the port of Seattle, Washington, on May 20, 1946, on the grounds above mentioned and who appealed.

The appellant is a native of Japan and a subject of Sweden by a previous marriage. Her father was a full-blooded German and her mother, a full-blooded Japanese. She has lived in Japan all her life. She applied for repatriation to Sweden as a 'recovered civilian' and while en route was married on May 9, 1946, on the high seas to a person who testified that he is a citizen of the United States and that he has been a member of the armed forces of the United States during World War II. He further testified that he expected to be discharged on May 17 or May 18, 1946 (p. 19). She arrived in the United States at the port of Seattle, Washington, on May

12, 1946, via the SS 'Stetson Victory' and applied for admission for the purpose of remaining permanently. She is not in possession of an immigration visa (pp. 2, 3, 4, 5, 6, 25, 26).

The record does not show whether the appellant's husband has been discharged from the Army and, if so, whether he has been honorably discharged. However, since she is excludable as an alien ineligible to citizenship and is detained at steamship expense, rather than to reopen to bring the record up-to-date, it will be assumed that her husband has been honorably discharged. Accordingly, the appellant is exempt from the documentary requirements under Public Law 271, approved December 28, 1945, and the documentary ground of exclusion is not sustained.

FINDINGS OF FACT: Upon the basis of all the evidence, it is found:

(1) That the appellant is an alien, a native of Japan and a subject of Sweden;

(2) That the appellant is of mixed blood, being of fifty percent of the white race and fifty percent of the Japanese race;

(3) That the appellant is the spouse of a citizen of the United States, who has served honorably in the Armed Forces of the United States during World War II;

(4) That the appellant arrived in the United States at the port of Seattle, Washington on May 12, 1946 aboard the SS "Stetson Victory" and has applied for admission into the United States for the purpose of remaining here permanently;

(5) That the appellant is not in possession of an immigration visa.

CONCLUSIONS OF LAW: Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Section 13(c) of the Act of May 26, 1924, as amended, the appellant is inadmissible to the United States in that she is an alien ineligible to citizenship and not entitled to enter the United States under any exception of said sub-section;

(2) That under Section 13(a) of the Act of May 26, 1924, the appellant is not inadmissible to the United States in that she is an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

The appellant met her husband on a bridge or in a park in Japan in November 1945. She cohabited with him in that country for a time while he was absent without official leave. Their testimony is conflicting regarding the manner in which they were supported during that time. The appellant testified that while her husband was absent without official leave they could only live by 'doing bad things.' She had no intention of proceeding to Sweden when she embarked. She cohabited with a former employer for about five years. She stated that she had been sick for about two years and that during that period she lived on her savings. She admits that she has had intimate relations with soldiers. She does not admit practicing prostitution. She also testified that at the insistance of her mother and sister she once submitted to a mental examination, that she was given a 'shot' and that there

was nothing wrong with her. Her testimony was rambling at times. She has been examined and passed by a medical officer of the United States Public Health Service. The record raises a doubt regarding whether the appellant and her husband intend to live together in the United States and the reasons that prompted them to enter into their marriage (p. 9). The appellant stated that she will jump overboard if she is sent back. She also stated that if she cannot be admitted permanently she would like to be admitted in transit. She states that she has 300 in England and 2000 krona in Sweden.

ORDER: It is ordered that the excluding decision of the Board of Special Inquiry be affirmed solely on the ground that the alien is ineligible to citizenship.

In accordance with 8 CFR 90.3, this case is referred to the Board of Immigration Appeals for consideration."

ARGUMENT

There is no dispute as to the facts, and the only question at issue is whether the appellee is entitled to enter the United States as a non-quota immigrant pursuant to Public Law 271, 79th Congress, Chapter 591, First Session, approved December 28, 1945, 8 U.S.C. Section 232, supra, and under Section 4(a) of the Immigration Act of 1924, 8 U.S.C. 204, supra.

The pertinent provisions of Public Law 271, supra are "that *notwithstanding any of the several*

clauses of Section 3 of the Act of February 5, 1917, *excluding physically and mentally defective aliens*, and *nothwithstanding the documentary requirments* of any of the Immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the Armed Forces of the United States during the Second World War shall, *if otherwise admissible under the Immigration laws*, and if application is made within three years of the effective date of this Act, be admitted to the United States: . . ." (Italics supplied)

It is indisputable that the legislation was designed to facilitate the admission of spouses and children of citizens serving in the Armed Forces. House Rep. 1320, 79th Congress, First Session. In executing this design, Congress might have provided in concise and unmistakable language an exemption from all immigration requirements. But the italicized passage of the statute indicates decisively that Congress intended to limit its bounty to the grant of two exemptions from normal immigration requirements:

(1) Waiver of the provisions excluding physically and mentally defective aliens;

(2) Elimination of documentary requirements.

The language of the statute and its legislative history demonstrates that Congress contemplated no relaxations beyond those specifically enumerated. 91 Cong. Rec. 11921, 12529. That is why the statute insists that applicants be *"otherwise admissible under the general immigration laws."*

It is a fundamental rule of law that Congress must be presumed to have intended the plain meaning of the language used in a statute, and that the courts are to give effect to the legislative acts, and not to amend or repeal them. The doctrine enunciated in *Holy Trinity Church v. United States*, 143 U.S. 457, is not applicable where the intent of Congress is clear and unambiguous from the statute itself.

What plainer language could the Congress have employed than *"if otherwise admissible under the immigration laws."*

Appellee, as will be shown hereafter, is racially ineligible to naturalization and therefore not *"otherwise admissible under the immigration laws."*

It will be observed that Section 13(c) of the Immigration Act of 1924, 8 U.S.C. 213, supra, contains no exemption for the wives and children of American citizens who are invested with "non-quota status" by Section 4(a) of the same statute, 8 U.S.C.

204(a). That omission was questioned by the Supreme Court of the United States in *Chang Chan v. Nagle*, 268 U.S. 346 (1925), in which it was contended that Congress could not have contemplated the separation of families, and that the failure to provide an exception in favor of racially ineligible wives and children of citizens therefore was inadvertent. The Supreme Court rejected this argument and declined to supply an exception where Congress deliberately had omitted to provide it. The court said, p. 352:

> "Taken in their ordinary sense, the words of the statute plainly exclude petitioners' wives . . . Nor can we approve the suggestion that the provisions contained in Subdivision (a) of § 4 were omitted from the exceptions in § 13(c) because of some obvious oversight and should now be treated as incorporated therein. Although descriptive of certain 'non-quota immigrants', that subdivision is subject to the positive inhibitions against all aliens ineligible to citizenship who do not fall within definitely specified and narrowly restricted classes."

Thus it must be conceded that if, as the Government claims, the appellee, is ineligible to naturalization, she is not admissible to the United States under Public Law 271, supra, and under Section 4(a) of the Immigration Act of 1924, supra.

At the time of appellee's arrival in the United States, naturalization under Section 303 of the Na-

tionality Act of 1940, 8 U.S.C. 703, was limited to white persons, persons of African nativity or descent, descendants of races indigenous to the Western Hemisphere, and Chinese persons or persons of Chinese descent.

Since *Ozawa v. United States*, 260 U.S. 178 (1922), it has been clear that persons of Japanese race are not eligible to become naturalized as American citizens.

Yamashita v. Hinkle, 260 U.S. 199, 43 S. Ct. 69, 67 L. Ed. 209;

United States v. Bhagat Singh Thind, 261 U.S. 204, 214, 43 S. Ct. 338, 67 L. Ed. 616;

Terrace v. Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255;

Porterfield v. Webb, 263 U.S. 225, 44 S. Ct. 21, 68 L. Ed. 278;

Webb v. O'Brien, 263 U.S. 313, 44 S. Ct. 112, 68 L. Ed. 318;

Cockrill vs. California, 268 U.S. 258, 45 S. Ct. 490, 69 L. Ed. 944.

With respect to persons of mixed racial blood, even prior to the promulgation of Part 350, Title 8 C.F.R., supra, the courts have uniformly deemed them eligible for naturalization only if they were preponderantly of an eligible racial strain. Thus it has been determined that a person whose father was white and

whose mother was Japanese is ineligible to naturalization.

In re Young, 198 Fed. 715 (Wash. 1912);
In re Camille, 6 Fed. 256;
In re Knight, 171 Fed. 299;
In re Alverto, 198 Fed 688;
In re Lampitoe, 232 Fed 382;
In re Rallos, 241 Fed 686;
In re Fisher, 21 Fed. (2d) 1007;
In re Cruz, 23 F. Supp. 774;
Morrison vs. People of the State of California, 291 U. S. 82.

Appellee, by her own admission, is not preponderantly of a racial eligible strain. When testifying before the Board of Special Inquiry at Seattle, Washington on May 13, 1946, she was asked the question, "Of what race are you?", to which she replied: "One-half German and one-half Japanese," (p. 30, record of hearing).

Thus appellee, as a person ineligible to naturalization, is inadmissible to the United States under Section 13(c) of the Immigration Act of 1924, 8 U.S.C. 213, supra, and was rightly excluded from admission to the United States by a duly constituted Board of Special Inquiry at Seattle, Washington on May 20, 1946.

CONCLUSION

The appellee is clearly inadmissible to the United States under Section 13(c) of the Immigration Act of 1924, supra, as a person ineligible to citizenship, and in entering the exclusion order the Immigration authorities did not act in an arbitrary manner, or misconstrue or misapply the law. Therefore, said order of exclusion is final and conclusive, and the District Court erred in granting the Writ.

It is respectfully submitted the judgment of the District Court should be reversed.

Respectfully submitted,

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